

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PAVEL LEONTE,

Plaintiff-Appellee,

V

CARMEN LEONTE,

Defendant-Appellant.

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UNPUBLISHED

May 24, 2011

No. 296602

Washtenaw Circuit Court

LC No. 09-001251-DM

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from a default judgment of divorce. We vacate the default judgment of divorce and remand this case for further proceedings consistent with this opinion.

**I. FACTS**

The parties were married for twenty-three years and share two children. During the course of the marriage, the parties accumulated substantial marital assets, including the marital residence, property in Romania, business properties, and bank accounts.

Defendant initially filed a complaint for divorce in 2008, but that action was dismissed when the parties reconciled. That reconciliation was short lived, however, and plaintiff filed a complaint for divorce the following year. Discovery requests and attendant motions and orders followed, but defendant consistently failed to comply.

After attending mediation, the parties again attempted to reconcile. Defendant alleges that plaintiff indicated that he would discontinue the divorce action. According to defendant, the parties agreed that defendant would no longer need an attorney and that there was no need to proceed with discovery. Acting on these understandings, defendant dismissed her attorney made no attempt to comply with plaintiff's discovery requests.

Plaintiff did not discontinue the divorce action, however, and a hearing on a motion to compel discovery was held, which defendant did not attend. The circuit court entered an order that required defendant to provide complete responses to all discovery requests within five days. One week later, plaintiff served defendant with notice that her deposition was to be taken.

Upon discovering that plaintiff was in fact continuing the prosecution of the divorce action, defendant re-retained her attorney. Shortly afterward, plaintiff filed a motion for a default under on the ground plaintiff had not complied with discovery requests and orders. See MCR 2.313(D)(1).

The day before defendant's scheduled deposition, plaintiff forwarded defendant's attorney a copy of the notice of deposition. Defendant's attorney stated that she had been unaware of the scheduled deposition and was not available given the short notice, but offered three alternative dates. Plaintiff's attorney did not agree to postpone the deposition, and filed an amended motion for default the next day on the ground that defendant failed to appear for the deposition.

Defendant opposed the motion on the ground that plaintiff had deceived her into missing discovery deadlines by feinting at reconciliation. Additionally, defendant stated that after she realized plaintiff was pressing ahead with the divorce, she made efforts to respond to discovery requests, but faced unexpected difficulties in the matter.

The circuit court granted plaintiff's motion, explaining, "It appears to the Court that there has been a lot of foot dragging regarding the answers to interrogatories. That [plaintiff] has continually allowed flexibility regarding them, but has gotten no answers. I'm going to grant the default." The court then set December 8, 2009 for a hearing to enter default judgment.

Before that hearing, defendant provided plaintiff with some responses to plaintiff's outstanding discovery request, but many of the documents that plaintiff requested were not retrievable because the computer in which they were stored had been corrupted. Defendant then filed a motion to set aside the default, which was served upon plaintiff on December 1, 2009, and received by the circuit court on December 7, 2009, one day before the hearing for entry of default judgment. Further, the notice of hearing attendant to the motion to set aside the default stated that the motion was to be heard at a date and time to be determined by the circuit court, but no hearing date was ever set, and the motion was never heard.

At hearing for the entry of default judgment, plaintiff called two expert witnesses to testify regarding the value of the parties' marital home and business assets. Plaintiff then testified regarding the parties' income, and the value of the furniture inside the marital home along with other miscellaneous items. Plaintiff also testified that his proposed property division was fair and equitable. Defendant, as the party in default, was not allowed to testify or call any witnesses, although the court did allow her to cross-examine plaintiff's witnesses. But the court did not allow defendant to cross-examine plaintiff himself, or raise any objections to the proposed judgment of divorce.

Following plaintiff's testimony, the circuit court signed plaintiff's proposed judgment of divorce. Plaintiff filed a motion for reconsideration, arguing that the judgment was inequitable among other claims of error. The circuit court denied the motion.

## II. DEFAULT JUDGMENT

Defendant argues that good cause existed to set aside the default. Defendant additionally argues that the circuit court erred when it entered the default judgment because it was

inequitable, the court proceeded to default judgment without first hearing defendant's motion to set aside the default, plaintiff had induced defendant into thinking she did not need to respond to discovery requests, and the remedy of default judgment was too harsh.

The decision whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). In this case, defendant argues that good cause existed under MCR 2.603 to set aside the default judgment. This Court, however, cannot properly evaluate that claim because the issue was never decided below. But we agree that the circuit court erred when it entered the default judgment without hearing defendant's motion to set aside the default.

Plaintiff argues that defendant's motion to set aside the default was untimely. We disagree. Under MCR 2.603(D)(2) a default may be set aside if a motion to do so is filed "before entry of a default judgment . . . ." The rule does not contain any time restrictions where the motion is filed before the default judgment is entered. In this case, defendant's motion was received by the circuit court on December 7, 2009, the day before the default judgment of divorce was entered. Therefore, it was timely.

Faced with the motion to set aside the default, the circuit court had the discretion to adjourn the hearing for the entry of the default judgment. See MCR 2.503(D)(1). Although defendant did not formally move the court for an adjournment, the court received the motion the previous day and was made aware of it at the hearing for entry of the default judgment. Therefore, the court should have addressed defendant's motion to set aside the default. By failing to exercise its discretion to adjourn the hearing for entry of the default judgment until after defendant's motion to set aside the default was heard, or otherwise address the timely motion to set aside the default, the court abused its discretion. See *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998) (a trial court's failure to exercise its discretion, when properly asked to do so, is itself an abuse of discretion).

The court's error is especially apparent in light of the defendant's claim of fraud. Defendant, in response to plaintiff's amended motion for default, alleged that plaintiff promised he would discontinue the divorce action and otherwise induced her to not respond to discovery, and reiterated such argument with her motion to set aside the default. The circuit court, however, never addressed defendant's claim of fraud.

"Long standing Michigan case law requires that when a party makes a motion alleging that fraud has been committed on the court, an evidentiary hearing is required." *Williams v Williams*, 214 Mich App 391, 394; 542 NW2d 892 (1995). Further, the requirement that a party pleading fraud do so with specificity "applies only to the original pleadings opening a case and not to subsequent motions." *Id.* at 395. For these reasons, the circuit court should have adjourned the hearing for entry of the default judgment to hear defendant's motion to set aside the default and take evidence to determine the validity of the fraud claim.

In light of our resolution of this case for the reasons stated, we need not reach defendant's remaining arguments.

We vacate the default judgment of divorce and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Douglas B. Shapiro